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STATE OF CALIFORNIA
Fish and Game Commission

February 8, 2012

TO ALL AFFECTED AND INTERESTED PARTIES:

This is to provide you with a copy of the notice of proposed emergency regulatory action relating to recreational take of abalone. The objective of this regulation is to repeal the emergency closure of the abalone fishery along Sonoma County before April 1, 2012, the historic opening day of the abalone fishery.

The Commission adopted this emergency regulation at its February 2, 2012 meeting. It is anticipated that the emergency regulation will be filed with the Office of Administrative Law (OAL) on or about February 15, 2012.

Sincerely,

Sherrie Fonbuena
Associate Governmental Program Analyst

Attachments

TITLE 14. Fish and Game Commission

Notice of Proposed Emergency Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 200, 202, 205, 210, 220, 240, 5521 and 7149.8 of the Fish and Game Code (FGC) and to implement, interpret or make specific sections 200, 202, 205, 220, 5521, 7145 and 7149.8 of said Code, re-adopted Section 29.15, Title 14, California Code of Regulations (CCR), relating to the recreational take of abalone. **The objective of this re-adoption is to repeal the closure of the abalone fishery along Sonoma County before April 1, 2012, the historic opening day of the abalone fishery.**

Informative Digest/Policy Statement Overview

Existing Laws and Regulations directly related to the proposed action

Under existing regulations (Section 29.15, Title 14, CCR), red abalone may only be taken for recreational purposes north of a line drawn due west magnetic from the center of the mouth of San Francisco Bay. Current regulations also specify: season, hours, daily limits, special gear provisions, measuring devices, abalone report card requirements, and sizes. There are no existing comparable federal regulations or statutes.

Effect of the Regulatory Action

The proposed emergency regulations will prohibit the take of abalone along the coast of Sonoma County **until March 30, 2012.**

Policy Statement Overview

The Department of Fish and Game (DFG) has confirmed a significant die-off of red abalone along the coast of Sonoma County. The cause has been determined to be an unusual red-tide event that occurred during late August and early September, 2011, although the specific mechanism that is responsible for the abalone mortality is still under investigation. Fishery regulations currently in place were not designed to provide conservation safeguards for this unexpectedly large increase in natural mortality. Furthermore, surviving abalone may have an intrinsic resistance to the underlying cause of this mortality, and it is therefore necessary to provide additional protection at this time so that the surviving animals will have an increased opportunity to reproduce and rebuild the population with potentially resistant offspring. Consequently, the Commission determined that abalone fishing must be closed along Sonoma County to protect the abalone resource.

Section 240 Finding

Pursuant to the authority vested in it by FGC Section 240 and for the reasons set forth in the attached "Statement of Emergency Action," the Commission expressly finds that the adoption of this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources. The Commission specifically finds that the adoption of this regulation is necessary for the immediate conservation, preservation, or protection of the abalone resource.

Public Comments on Proposed Emergency Regulations

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In order to be considered, public comments on proposed emergency regulations must be submitted in writing to the Office of Administrative Law (OAL), 300 Capitol Mall, Room 1250, Sacramento, CA 95814; AND to the Fish and Game Commission, 1416 Ninth Street, Room 1320, Sacramento, CA 95814, or via fax to (916) 653-5040 or via e-mail to fgc@fgc.ca.gov. Comments must identify the emergency topic and may address the finding of emergency, the standards set forth in sections 11346.1 and 11349.1 of the Government Code and Section 240 of the Fish and Game Code. Comments must be received within five calendar days of filing of the emergency regulations. Please refer to OAL's website (www.oal.ca.gov) to determine the date on which the regulations are filed with OAL.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) **Costs/Savings in Federal Funding to the State:**

The Commission has determined that the amendment of Section 29.15, Title 14, of the California Code of Regulations (CCR), as an emergency regulation will not result in costs or savings in federal funding to the State.

(b) **Nondiscretionary Costs/Savings to Local Agencies:**

The Commission has determined that amendment of Section 29.15, Title 14, CCR, as an emergency regulation will not result in any costs or savings to local agencies.

(c) **Programs Mandated on Local Agencies or School Districts:**

The Commission has determined that the amendment of Section 29.15, Title 14, CCR, as an emergency regulation does not impose a mandate on local agencies or school districts.

(d) **Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code; and**

(e) **Effect on Housing Costs:**

(e) Effect on Housing Costs:

The Commission has determined that the amendment of Section 29.15, Title 14, CCR as an emergency regulation will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement and will not affect housing costs.

(f) Costs or Savings to State Agencies

The Commission has determined that amendment of Section 29.15, Title 14, CCR as an emergency regulation will not change any cost or savings to state agencies.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code sections 11342.580 and 11346.2(a)(1).

Consideration of Alternatives

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost-effective to the affected private persons and equally effective in implementing the statutory policy or other provision of law.

FISH AND GAME COMMISSION

Dated: February 8, 2012

Sonke Mastrup
Executive Director

REGULATORY LANGUAGE

Section 29.15, Title 14, CCR is amended to read:

29.15. Abalone

(a) Geographic Area: Except in the special closure area described in subsection (a)(1) below, abalone may only be taken north of a line drawn due west magnetic from the center of the mouth of San Francisco Bay. No abalone may be taken, landed, or possessed if landed south of this line.

(1) Special Closure: No abalone may be taken between a line drawn due west magnetic from the Sonoma/Marin County line, north to a line drawn due west magnetic from the Sonoma/ Mendocino County line (All of the Sonoma County coast line). This special closure is in effect from October 4, 2011 through March 30, 2012, and is repealed on March 31, 2012.

...

Subsections (b) through (h) remain unchanged.

...

Note: Authority cited: Sections 200, 202, 205, 210, 220, 240, 5521 and 7149.8, Fish and Game Code. Reference: Sections 200, 202, 205, 220, 5521, 7145 and 7149.8, Fish and Game Code.

**FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY ACTION
FOR RE-ADOPTION OF EMERGENCY REGULATIONS**

Emergency Action to Re-adopt Subdivision (a) of Section 29.15, Title 14, CCR,
Re: Abalone

I. Request for Approval of Re-adoption of Emergency Regulation

The Fish and Game Commission (Commission) requests to re-adopt the amendment to subdivision (a) of Section 29.15, Title 14, California Code of Regulations (CCR) [Office of Administrative Law (OAL) file number 2011-0927-02 E] without modification, and to repeal the emergency changes on March 31 2012. The Findings of Emergency for this file (Attachment A), which contain the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; and Standard Form 399 are incorporated by reference.

The abalone fishery is normally open during the months of April, May, June, August, September, October and November in all areas north of a line drawn due west from the center of San Francisco Bay; however, a recent rulemaking (OAL file number 2011-1219-08S) closed the Fort Ross area to the take of abalone for the months of April and May. The objective of this re-adoption is to repeal the closure of the abalone fishery along Sonoma County before April 1, 2012, the historic opening day of the abalone fishery.

II. Emergency Regulation in Effect to Date

On September 15, 2011, the Commission adopted an emergency regulation to close the abalone fishery along the Sonoma County coast in response to a large scale die off of the species along the Sonoma County coast caused by an unusual red tide event. (Cal. Reg. Notice Register 2011, No. 41-Z, p. 1687 (October 14, 2011)). The emergency regulation was approved by OAL and became effective on October 4, 2011. Pursuant to Government Code (GC) sections 11346.1(e) and (h), emergency regulations are effective for 180 days. OAL may approve two re-adoptions, each for a period not to exceed ninety days. In the absence of re-adoption, the current emergency regulation will expire on April 3, 2012.

III. Statement of Emergency

The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its request to OAL to approve the re-adoption of the amendment to subdivision (a) of Section 29.15, Title 14, CCR. The Commission's adoption, and requested re-adoption, of subdivision (a) of Section 29.15, Title 14, CCR, as an

emergency action under the APA is based, in part, on authority provided by FGC section 240.

As set forth above, the Commission found that the amendment of subdivision (a) of Section 29.15, Title 14, CCR, pursuant to FGC section 240 constituted a necessary emergency action by the Commission under the APA. However, the emergency circumstances that necessitated the amendment have ended and the Commission finds that reopening the abalone fishery on the historic opening date is appropriate.

A Harmful Algal Bloom (HAB) also known as a "Red Tide" was documented along the Sonoma County coast coincident with a large die off of invertebrates in late August 2011. Most phytoplankton (microalgae) blooms are harmless but in some cases the algal species can produce toxins thus creating a HAB event. The nearshore phytoplankton bloom extended from approximately Bodega Bay north to Anchor Bay. The invertebrates affected by the bloom were reported from many taxa including mollusks (including abalone), echinoderms (i.e. sea urchins) and crustacean but fish deaths were not observed. By October the bloom had run its course and was no longer contributing to increased invertebrate mortality.

Water samples collected during the bloom revealed a number of phytoplankton species with the most abundant being the dinoflagellate, *Gonyaulax spinifera*. Standard tests for Paralytic Shellfish Poisoning and Domoic Acid biotoxins were negative during the bloom. Tests of tissue samples from dead abalone showed trace quantities of Yessotoxin, which can be produced by this *Gonyaulax* species. Little is known about the potential of this class of toxins to cause invertebrate mortality therefore other causes have not been ruled out.

Surveys of abalone and sea urchin populations conducted immediately after the HAB event along the Sonoma coast revealed significant mortality levels. Survey results were provided to Commission which lead it to approve the emergency closure of the red abalone fishery in Sonoma County for the remainder of the season (OAL File number 2011-0927-02 E).

This type of dinoflagellate has a complex life cycle with a resting cyst stage. The concern about these dormant cysts is that they may re-bloom at some time in the future when ocean conditions are optimal. A re-bloom of this toxic dinoflagellate could again cause invertebrate mortality in northern California. More work is being conducted to determine the long term impacts as well as the causes of this significant and novel abalone and sea urchin mortality event.

IV. Re-adoption Criteria

1) Same or Substantially Equivalent

Pursuant to GC section 11346.1(h), the text of a re-adopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The proposed language for the re-adopted regulatory amendment is substantially the same as the language of the original emergency regulation. A sentence will be added to the regulatory text which specifies that the special closure is in effect from October 4, 2011 through March 30, 2012, and is repealed on March 31, 2012. As the regulatory text is substantially the same as the original emergency regulation, this requirement has been met.

(2) Substantial Progress

GC section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making "substantial progress and has proceeded with due diligence" to comply with the standard rulemaking provisions. The Commission has not technically complied with this requirement because a standard rulemaking is not necessary in this particular circumstance. More work is being conducted to determine the long term impacts as well as the causes of the mortality event; however, the emergency circumstances that necessitated the original emergency regulation have ended and the Commission finds that reopening the abalone fishery on the historic opening date is appropriate in that the current season, minimum size limit, daily bag limit and yearly trip limit are sufficient to maintain a sustainable fishery.

**FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY ACTION**

Emergency Action to Re-adopt Amendments to Section 29.15, Title 14, CCR,
Re: Abalone

I. INTRODUCTION

The Fish and Game Commission ("Commission") as established by the Constitution of the State of California has exclusive statutory authority to manage abalone (Fish and Game Code Section 5520). Pursuant to Fish and Game Code 240, if the Commission is made aware of a situation where the immediate conservation, preservation, or protection of birds, mammals, reptiles, or fish (abalone) requires the adoption or repeal of a regulation (pursuant to Section 11346.1 of the Gov. code), it may do so after at least one hearing where such a finding can be made.

On September 9, 2011, the Commission was briefed by Department of Fish and Game (DFG) staff as to the potential impacts of an apparent large scale death of abalone along the Sonoma County coast during the last part of August 2011. The event appears to have been caused by a red tide event that produced toxins or depleted oxygen, killing a significant portion of the population.

The scope of the potential impact was not determined until after the deadline for publishing the notice for the September 2011 commission meeting. This combined with the necessity to protect the resource activates the authority for an abbreviated notice requirement under 11125.3 (a)(1) of the Gov. Code.

On September 15, 2011, the Commission determined that abalone fishery must be closed along Sonoma county to protect the sustainability of the species. The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its subsequent amendment of section 29.15 of Title 14 of the California Code of Regulations.

Closing Sonoma County to the take of abalone constitutes a necessary emergency action by the Commission under the APA. In the absence of this emergency regulation, take would continue on populations that may no longer be able to sustain a fishery and could harm future recovery. The Commission finds it is imperative to protect the surviving abalone until a more thorough assessment of the impacts can be completed. This situation constitutes an emergency under Fish and Game Code section 240 and the APA requiring immediate action.

II. BACKGROUND

The Department issued a press release on September 12, 2011 detailing the situation:

California Department of Fish and Game News Release September 12, 2011

Media Contacts:

Ian Taniguchi, DFG Marine Region, (562) 342-7182

Kirsten Macintyre, DFG Communications, (916) 322-8988

Closure of Abalone Fishery Under Consideration

The California Fish and Game Commission will consider emergency action on Thursday, Sept. 15 to possibly close the abalone fishery along the northern California coast. This action is being considered in the wake of confirmed reports of dead red abalone and other invertebrates on beaches and inside coves along the coast in Sonoma County.

The Department of Fish and Game (DFG) is currently attempting to assess the impact of the situation and will provide the Commission with information at this Thursday's meeting. Based on the DFG's report, the Commission may take emergency action to close the abalone season along all or parts of the Sonoma coast.

There was an abalone die-off along the Sonoma coast beginning Aug. 27 as a result of a red tide-induced poisoning and/or lack of oxygen. According to DFG biologists, these abalone deaths coincided with a local red tide bloom and calm ocean conditions. Although the exact reasons for the abalone deaths are not known, invertebrate die-offs have occurred in the past along the northern California coast when similar weather and bloom conditions existed.

The number of dead and dying abalone is not known but DFG divers are assessing the damage this week via underwater transect surveys. Reports of dead abalone and a variety of invertebrates have come from Bodega Bay, Russian Gulch, Fort Ross, Timber Cove and Salt Point State Park. Other DFG biologists and game wardens have collected abalone, mussels and water samples since the beginning and are continuing to document reports from the public.

For more information, please refer to DFG's Sept. 2 press release, <http://cdfgnews.wordpress.com/2011/09/02/abalone-die-off-observed-in-sonoma-county/>.

Abalone fishermen are advised to contact a physician immediately if they feel sick, and to report symptoms to the local county health department (www.sonoma-county.org/health/about/publichealth.asp). The latest red tide updates from the California Department of Public Health are also posted online at www.cdph.ca.gov/programs/Pages/DDWEM.aspx.

III. FACTS CONSTITUTING THE NEED FOR EMERGENCY ACTION

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (*Id.* § 11342.545.) To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (*Id.*, § 11346.1, subd. (b)(2).) Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. DFG field surveys in recent days have provided preliminary data that show the level of mortality from this event is significant, and it is clear that fishery regulations currently in place were not anticipated to provide conservation safeguards for this unexpected increase in natural mortality. Furthermore, surviving animals may have an intrinsic resistance to the underlying cause of this mortality, and it is therefore necessary to provide additional protection at this time so that the surviving animals will have an increased opportunity to reproduce and rebuild the population.

The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in Fish and Game Code section 240. Under this latter authority, notwithstanding any other provision of the Fish and Game Code, the Commission may adopt an emergency regulation where doing so is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, or for the immediate preservation of the general welfare. The Commission finds that such necessity exists in the present case.

IV. Express Finding of Emergency

Pursuant to the authority vested in the Commission by Fish and Game Code section 240, and for the reasons set forth above, the Commission expressly finds that the amendment of this regulation is necessary for the immediate conservation, preservation, or protection of the abalone resource.

V. Authority and Reference Citations

Authority: FGC sections 200, 202, 205, 210, 220, 240, 5521 and 7149.8.

Reference: FGC sections 200, 202, 205, 220, 240, 5521, 7145 and 7149.8.

VI. Informative Digest

Existing Laws and Regulations directly related to the proposed action

Under existing regulations (Section 29.15, Title 14, CCR), red abalone may only be taken for recreational purposes north of a line drawn due west magnetic from the center of the mouth of San Francisco Bay. Current regulations also specify: season, hours, daily limits, special gear provisions, measuring devices, abalone report card requirements, and sizes. There are no existing comparable federal regulations or statutes.

Effect of the Regulatory Action

The proposed emergency regulations will prohibit the take of abalone along the coast of Sonoma County **until March 30, 2012.**

Policy Statement Overview

DFG has confirmed a significant die-off of red abalone along the coast of Sonoma County. The cause has been determined to be an unusual red-tide event that occurred during late August and early September, 2011, although the specific mechanism that is responsible for the abalone mortality is still under investigation. Fishery regulations currently in place were not designed to provide conservation safeguards for this unexpectedly large increase in natural mortality. Furthermore, surviving abalone may have an intrinsic resistance to the underlying cause of this mortality, and it is therefore necessary to provide additional protection at this time so that the surviving animals will have an increased opportunity to reproduce and rebuild the population with potentially resistant offspring. Consequently, the Commission determined that abalone fishing must be closed along Sonoma County to protect the abalone resource.

Benefits of the Regulation

The original emergency regulation closed the recreational abalone season along the Sonoma County coast in response to a die-off as a result of an unusual red-tide event. The closure was intended to last through the remainder of the 2011 season. Repealing the special closure prior to the historic opening day of the abalone season allows for appropriate utilization of the abalone resource.

VII. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to Fish and Game Code section 240. The Commission held a public hearing on this regulation on

September 15, 2011, and the above finding that this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources meets the requirements of section 240.

VIII. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) **Costs/Savings in Federal Funding to the State:**

The Commission has determined that the amendment of Section 29.15, Title 14, of the California Code of Regulations (CCR), as an emergency regulation will not result in costs or savings in federal funding to the State.

(b) **Nondiscretionary Costs/Savings to Local Agencies:**

The Commission has determined that amendment of Section 29.15, Title 14, CCR, as an emergency regulation will not result in any costs or savings to local agencies.

(c) **Programs Mandated on Local Agencies or School Districts:**

The Commission has determined that the amendment of Section 29.15, Title 14, CCR, as an emergency regulation does not impose a mandate on local agencies or school districts.

(d) **Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code; and**

(e) **Effect on Housing Costs:**

The Commission has determined that the amendment of Section 29.15, Title 14, CCR as an emergency regulation will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement and will not affect housing costs.

(f) **Costs or Savings to State Agencies**

The Commission has determined that amendment of Section 29.15, Title 14, CCR as an emergency regulation will not change any cost or savings to state agencies.